BILL C-17: THE PUBLIC SAFETY ACT, 2002

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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-17: THE PUBLIC SAFETY ACT, 2002*

INTRODUCTION

Bill C-17, the proposed *Public Safety Act, 2002*, received first reading in the House of Commons on 31 October 2002. **On 20 November 2002 it was referred to a Legislative Committee for further study.** The Bill replaced Bill C-55, which died on the *Order Paper* when the first session of the 37th Parliament ended on 16 September 2002. Bill C-55, in turn, replaced Bill C-42, which was given first reading on 22 November 2001. Bill C-42 received significant criticism, however, and the Government did not proceed with it. Significant differences between Bill C-17 and its predecessors will be noted in this document. The Bill is one of three in the Government's legislative response to the events of 11 September 2001 in the United States. Bill C-36, the *Anti-terrorism Act*, most provisions of which received Royal Assent on 18 December 2001, was the first. On 28 November 2001, the House of Commons unanimously consented to a motion to delete from Bill C-42 section 4.83 in clause 5 amending the *Aeronautics Act*. The same day, that section was introduced as Bill C-44 in order to provide for speedier passage than consideration as part of Bill C-42 would have allowed for. It received Royal Assent on 18 December 2001.

Bill C-17 amends 23 existing Acts, and enacts a new statute to implement the Biological and Toxin Weapons Convention, which entered into force on 26 March 1975.

The purpose of this document is to provide a summary of the various aspects of the Bill **and of its consideration by the House of Commons Legislative Committee**. In general, the statutes being amended will be discussed in the alphabetical order in which they

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* Notice: For clarity of exposition, the legislative proposals set out in the Bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

appear in the Bill. A number of statutes, however, are amended in a similar manner to provide for the making of interim orders if immediate action is required and these have been grouped together. The two parts dealing with information sharing in relation to immigration matters are also discussed together.

PART 1: *AERONAUTICS ACT* (CLAUSES 2-23)

The purpose of the proposed amendments to the *Aeronautics Act* is to clarify and, in some cases, expand existing aviation security authorities. The amendments are intended to enhance the ability of the federal government to provide a safe and secure aviation environment.

A. Interpretation

Clause 2(2) amends the existing extremely broad definition of "Canadian aviation document" in section 3(1) of the *Aeronautics Act* to make it subject to proposed section 3(3) of the Act. The effect is to remove security clearances, restricted area passes issued by the Minister of Transport at an aerodrome operated by the Minister, and other Canadian aviation documents specified in an aviation security regulation, from the Civil Aviation Tribunal review process contained in sections 6.6 to 7.2 of the Act. The Tribunal was established in 1986 as a technical body to review regulatory enforcement decisions as well as decisions related to the technical qualifications of pilots, air traffic controllers, aircraft maintenance engineers and other aviation personnel and organizations. Transport Canada does not consider it appropriate that the Tribunal review departmental decisions related to security clearances, restricted area passes, and whether an individual constitutes a security risk.

Clause 2(3) adds definitions, in section 3(1) of the Act, for the terms "aviation reservation system," "aviation security regulation," "emergency direction," "security clearance" and "security measure" for purposes of the Act.

B. Ministerial Delegations

Clause 3 amends section 4.3 of the Act to extend the Minister's ability to delegate powers, duties or functions to any "class of persons," and to expand the list of legislative instruments in respect of which delegations may not be made to include security measures and

emergency directions, although the Minister may delegate his or her authority to make an order, security measure or emergency direction if the Act specifically authorizes the delegation. Currently, the Act authorizes the Minister to delegate his or her authority only to make orders closing airspace and aerodromes (section 4.3(3)).

C. Charges

Clause 4 amends section 4.4(2) of the Act, by adding a new paragraph (a.1) to provide that regulations may impose charges in respect of any security measure carried out by or on behalf of the Minister. Currently, there is no explicit regulation-making authority to impose charges for security measures that the department carries out.

D. Aviation Security

Clause 5 of the Bill replaces sections 4.7 and 4.8 of the Act by proposed sections 4.7 to 4.87.

Proposed section 4.7 defines "goods" and "screening" for the purposes of proposed sections 4.71 to 4.85. "Goods" are defined to include anything that may be taken or placed on board an aircraft or brought into an aerodrome or other aviation facility. The current definition is restricted to things that may be taken or placed on board an aircraft. The definition for "screening" is similar to that which currently exists for "authorized search." The definition encompasses the various requirements that may be set out in three areas – aviation security regulations, security measures or emergency directions – that are designed to ensure that persons and/or goods do not possess and/or contain items that could constitute a threat to aviation security, prior to boarding an aircraft or entering, for example, a restricted area of an aerodrome. The definition also clarifies that a "screening" can include a physical search.

E. Aviation Security Regulations

In section 4.7(2), the Act currently authorizes the Governor in Council to make regulations respecting aviation security "for the purposes of protecting passengers, crew members, aircraft and aerodromes and other aviation facilities, preventing unlawful interference with civil aviation and ensuring that appropriate action is taken where that interference occurs or is likely to occur." The *Canadian Aviation Security Regulations* have been made pursuant to this enabling power.

Proposed section 4.71 of the Act grants much broader regulation-making authority than is currently the case. The section authorizes the Governor in Council to make regulations respecting "aviation security," and then goes on to provide examples and clarify the kinds of matters that can be addressed in the regulations, without limiting the generality of that broad term. Included among the matters on which regulations may be made are:

- the safety of the public, passengers, crew members, aircraft, aerodromes and other aviation facilities;
- restricted areas on aircraft or at aerodromes and other aviation facilities;
- the screening of persons and goods;
- the seizure or detention of goods in the course of screenings;
- the prevention of unlawful interference with civil aviation and the action to be taken if interference occurs;
- persons or classes of persons required to have a security clearance;
- applications for security clearances;
- Canadian aviation documents deemed not to be such documents for the purpose of sections 6.6 to 7.2 of the Act (concerning the Civil Aviation Tribunal review process);
- security requirements for the design or construction of aircraft, aerodromes and other aviation facilities;
- security management systems;
- security requirements for equipment, systems and processes;
- qualifications, training and performance standards for classes of persons having security responsibilities;
- the testing of equipment, systems and processes; and
- the provision of security-related information to the Minister.

F. Security Measures

Under Bill C-17's predecessor, Bill C-55, proposed section 4.72 authorized the Minister to make aviation security measures in respect of any matter that could be dealt with in the aviation security regulations. There were no further restrictions. Bill C-17 provides that the Minister can make an aviation security measure only *if secrecy is required*. Once the Minister is of the opinion that aviation security, the security of any aircraft or aerodrome or other aviation facility or the safety of the public, passengers or crew members will no longer be compromised if the particular matter that was the subject of a security measure becomes public, the Minister

must (a) within 23 days after forming the opinion, publish in the *Canada Gazette* a notice that sets out the substance of the security measure and states that secrecy is no longer required in respect of the security measure, and (b) repeal the security measure before the earlier of the day that is one year after the notice is published and the day a regulation is made in respect of the matter dealt with by the measure.

Before making a security measure, the Minister must consult with appropriate persons or organizations. The consultation may be bypassed if, in the Minister's opinion, the security measure is immediately required for aviation security, the security of any aircraft or aerodrome or other aviation facility or the safety of the public, passengers or crew members. The Minister may carry out the requirements of a security measure whenever he or she considers it necessary to do so.

Departmental officials note that it is important to distinguish between regulatory requirements of general application that are published in the *Canada Gazette*, pursuant to the *Statutory Instruments Act*, and those requirements which, by their very nature, must be capable of being made quickly and must be kept confidential. They point out that under the current aviation security legislative framework, security measures are prescribed by two Ministerial Orders: the *Aerodrome Security Measures Order* and the *Air Carrier Security Measures Order*. The Orders are currently exempted from certain of the requirements of the *Statutory Instruments Act*, in the same way that security measures are exempted from the requirements of that Act pursuant to proposed amendments to section 6.2 (see clause 10 of the Bill).

The implementation of security measures is generally the responsibility of those to whom the measures are directed, in most cases air carriers and aerodrome operators.

Whereas the Act does not currently allow the Minister to delegate his or her authority to make orders prescribing security measures, **section 4.73 as originally proposed would have permitted the Minister to authorize an officer of the department to make security measures. In Committee, delegation was restricted to the deputy.** The delegated power is subject to any restrictions the Minister may specify, in circumstances where the measures are *immediately required* for aviation security, the security of any aircraft or aerodrome or other aviation facility or the safety of the public, passengers or crew members. The deputy is restricted to making a security measure in relation to a particular matter in circumstances similar to those under which the Minister may make a security measure under proposed section 4.72. A security measure made by the deputy expires after 90 days, unless it is earlier repealed by the Minister or the deputy.

Proposed section 4.74 states that a security measure may provide that it applies in lieu of, or in addition to, any aviation security regulation and that in the event of a conflict between the two, the security measure prevails to the extent of the conflict. The current Act is silent on which takes precedence if there is a conflict.

G. Foreign Aircraft Requirements

Proposed section 4.75, which is comparable to current section 4.7(3) of the Act, makes it an offence for the operators of foreign aircraft to land in Canada, unless the aircraft and all persons on board have been subjected to requirements that are acceptable to the Minister.

H. Emergency Directions

The Act does not currently provide for the issuance of emergency directions. Proposed sections 4.76 to 4.78 authorize the Minister (or a delegate, who can be any officer in the Department of Transport) to issue such directions in immediate threat situations, including directions respecting the evacuation of aircraft and aerodromes or other aviation facilities (or parts of them), the diversion of aircraft to alternative landing sites, and the movement of aircraft or persons at aerodromes or other aviation facilities. An emergency direction may provide that it applies in lieu of or in addition to any aviation security regulation or security measure. If there is a conflict between an emergency direction and a security measure or aviation security regulation, the emergency direction prevails to the extent of the conflict.

A provision not included in Bill C-17's predecessor, Bill C-55, has been added regarding the duration of an emergency direction. It comes into force immediately, but ceases to have force 72 hours later, unless it is repealed earlier by the Minister or the officer who made it.

I. Unauthorized Disclosure

Proposed section 4.79 provides that unless the Minister states under proposed section 4.72(3) that secrecy is no longer required in respect of a security measure, no person other than the person who made it is permitted to disclose its substance to any other person, unless the disclosure is required by law or is necessary to give effect to the measure. Notice must be given to the Minister where a court or other body intends to request the production or discovery of a security measure. If the court or other body concludes in the circumstances of the

case that the public interest in the administration of justice outweighs in importance the public interest in aviation security, it must order the production of the security measure, subject to any restrictions or conditions that the court or other body considers appropriate.

J. Security Clearances

The Act does not currently provide explicit authority for requiring and issuing security clearances. The current security clearance program, as it applies to restricted area pass holders at major Canadian airports, has been implemented by regulations. Hence, proposed section 4.8 provides explicit authority for the Minister to grant or refuse to grant security clearances, as well as to suspend or cancel security clearances. This is in addition to the Governor in Council's authority under proposed section 4.71(2)(g) to make regulations requiring a person or class of persons to have a security clearance as a condition to conducting any activity specified in the regulations or to being the holder of a Canadian aviation document, a crew member, or the holder of a restricted area pass.

K. Provision of Information

Section 4.81, a new provision not contained in the current Act, empowers the Minister or authorized departmental officers to require certain passenger information from air carriers and operators of aviation reservation systems. The information required to be provided, set out in the proposed schedule to the Act, must be for the purposes of transportation security and may pertain to the persons on board or expected to be on board a specific flight in respect of which there is an *immediate threat*, or to any particular person specified by the Minister. "Transportation security" is broadly defined.

Information provided under proposed section 4.81 may be disclosed to other persons in the department only for the purposes of transportation security. Similarly, it may be disclosed to the following persons outside the department only for the purposes of transportation security: the Minister of Citizenship and Immigration; the Minister of National Revenue; the chief executive officer of the Canadian Air Transport Security Authority; and any person designated under proposed sections 4.82(2) or (3). Information disclosed to the above-specified persons may be further disclosed by them only for the purposes of transportation security, and strict limits are placed concerning the persons to whom they may disclose the information.

Generally, information provided or disclosed under proposed section 4.81 must be destroyed within seven days after it was provided or disclosed. This applies notwithstanding any other Act of Parliament.

The Governor in Council may, by order, amend the proposed schedule to the Act, referred to in section 4.81, on the recommendation of the Minister.

Section 4.82 is another provision not contained in the current Act. It authorizes the Commissioner of the Royal Canadian Mounted Police (RCMP), the Director of the Canadian Security Intelligence Service (CSIS), and the persons they designate, to require certain passenger information (set out in the proposed schedule to the Act) from air carriers and operators of aviation reservation systems, to be used and disclosed for transportation security purposes; national security investigations relating to terrorism; situations of immediate threat to the life or safety of a person; the enforcement of arrest warrants for offences punishable by five years or more of imprisonment and that are specified in the regulations; and arrest warrants under the *Immigration and Refugee Protection Act* and the *Extradition Act*.

Section 4.82 authorizes the Commissioner of the RCMP to designate persons to receive and analyze the information provided by air carriers and operators of aviation reservation systems and to match it with any other information under the control of the RCMP. Similarly, the Director of CSIS is empowered to designate persons to receive and analyze the information and match it with any other information under the control of CSIS.

Persons designated by the Commissioner or Director may disclose any information provided under the provision, and any information obtained as a result of matching the information with other information, to each other.

Persons designated by either official under section 4.82 may disclose any information provided under the provision, or information obtained as a result of matching that information with other information, only in accordance with the disclosure regime set out in the provision (which stipulates specific disclosure purposes and parties to whom information can be disclosed) or for the purpose of complying with a subpoena or court order.

A person designated by the Commissioner or Director may disclose the information for purposes of transportation security to the Minister of Transport, the Canadian Air Transport Security Authority, any peace officer, any member of CSIS, any air carrier or operator of an aviation facility. Any information disclosed to the Canadian Air Transport Security Authority or to an air carrier or operator of an aviation facility must also be disclosed to the Minister of Transport.

A person designated by the Commissioner or Director may disclose information provided under the proposed section to an Aircraft Protective Officer if the designated person has reason to believe that the information may assist the officer to perform duties relating to transportation security, and to any person if the designated person has reason to believe that there is an immediate threat to transportation security or the life, health or safety of a person, **and the person to whom it is disclosed needs the information to respond to the threat and is in a position to do so. The restriction on disclosure was added by the Committee.** Only relevant information may be disclosed.

A person designated by the Commissioner of the RCMP may disclose information provided under the section to any peace officer if the designated person has reason to believe that the information would assist in the execution of a warrant for offences specified in regulations. "Warrant" is defined in section 4.82 for purposes of the provision.

A person designated by the Director of CSIS may disclose information provided pursuant to the provision to an employee of CSIS for the purposes of a national security investigation related to terrorism. However, the disclosure must be authorized by a senior designated person.

A designated person who discloses information under section 4.82 must prepare and keep a record setting out a summary of the information disclosed, the elements of information disclosed, the elements of information set out in the proposed schedule in respect of which there was disclosure, the reasons why the information was disclosed and the name of the person or body to whom the information was disclosed.

Information provided under the proposed section and information shared among designated persons must be destroyed within seven days after its receipt, unless it is reasonably required for security purposes, in which case a record must be prepared and kept setting out the reasons why the information is being retained. The Commissioner and the Director must cause at least an annual review to be undertaken of information retained pursuant to proposed section 4.82 and the Commissioner or Director, as the case may be, must order the destruction of the information if he or she is of the opinion that its continued retention is not reasonably required for the purposes of transportation security or to investigate terrorist threats. The Commissioner and the Director must each keep a record of their review. The destruction provision applies notwithstanding any other Act of Parliament.

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Section 4.82 proved to be one of the most controversial parts of the Bill during study by the Legislative Committee. The Privacy Commissioner maintained that the provision permitting information received from the airlines to be matched against police databases for the purpose of executing specified arrest warrants was unrelated to the anti-terrorism or transportation security purposes of the Bill. He therefore called for the deletion of section 4.82(11), as did a number of other witnesses. Some groups recommended that the entire section be removed in the interests of privacy and civil liberties.

It is important to note that that sections 4.82(4) and (5) permit the RCMP or CSIS to request information from air carriers or operators of reservation systems regarding the people on board an aircraft *for any flight specified* or *concerning any particular person specified.* These words, on their face, would seem to indicate a degree of particularity or specificity in the request for data. In his testimony before the Legislative Committee, however, the Privacy Commissioner was the first to indicate that this was not the intention. He stated that it was his understanding that the purpose was to receive information with regard to *every* flight.

When witnesses from the RCMP and CSIS appeared subsequently before the Committee, they stated that the intent of the provision was to enable them to receive a continuous electronic data feed from the airlines regarding all passengers for all flights where it was technologically possible to do so. Further, they stated that they interpreted the wording of the provisions to permit that and, in addition, felt that their interpretation was the only way the system could actually work and meet their needs.

Certain members of the Committee, however, felt that the plain meaning of the words of the provision did not support such an expansive interpretation, so the decision was taken to invite government officials to a committee meeting specifically to address the point.

At the subsequent meeting, officials confirmed that the intention of sections 4.82(4) and (5) was to permit a continuous data feed. In response, some members of the Committee felt that an amendment would be advisable to clarify the intent, and one thought such a change essential. At clause-by-clause consideration, however, no

government amendment was proposed, and an opposition amendment to the provision was defeated.

Clause 6 amends section 4.83 of the *Aeronautics Act* (which already authorizes the type of passenger information scheme set out in the section by virtue of a recent amendment to the Act made by Bill C-44)[1] to clarify the circumstances under which an air carrier may provide information to a foreign state in accordance with the regulations. It also clarifies the circumstances in which government institutions (within the meaning of section 3 of the *Privacy Act*) can obtain information provided to a foreign state under section 4.83. Under the proposed amendment, an air carrier may provide to a country information on passengers on board, or expected to be on board, an aircraft departing from Canada or on board, or expected to be on board, a Canadian aircraft departing from anywhere, only if that flight is scheduled to land in that country. According to departmental sources, the section is also being clarified to ensure that departments administering Acts that prohibit, control or regulate the importation or exportation of goods or the movement of people in or out of Canada are able to obtain information provided to foreign authorities under the provision. The proposed amendment adds enforcement of border-related statutes as a permitted purpose.

L. Screenings

Proposed section 4.84, similar to current section 4.7(1), authorizes the Minister to designate persons to conduct screenings under the Act, subject to any specified restrictions or conditions.

Proposed section 4.85 establishes a number of prohibitions related to the screening of passengers, other persons, goods and conveyances.

Under proposed section 4.85, a person is prohibited from entering or remaining in an aircraft, an aviation facility, or a restricted area of an aerodrome unless the person permits his or her person and goods to be screened in accordance with the applicable aviation security regulation, security measure or emergency direction.

Although the current Act covers passengers and goods boarding or on board aircraft, it does not address the screening (i.e., search) of persons who wish to enter aviation facilities or restricted areas of aerodromes.

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(1) Bill C-44, *An Act to amend the Aeronautics Act*, S.C. 2001, c. 38. The Act came into force on the same day it received Royal Assent – 18 December 2001.

Proposed section 4.85 also prohibits:

- the operator of a conveyance (for example, a truck) from entering or remaining in an aviation facility or an aerodrome unless the operator permits a screening of the conveyance in accordance with aviation security regulations, security measures or emergency directions;

- air carriers from transporting persons and goods unless the persons and goods have been screened in accordance with the applicable aviation security regulation, security measure or emergency direction; and

- persons who accept goods for transportation from tendering the goods for transportation by air, unless they have screened the goods in accordance with the relevant aviation security regulation, security measure or emergency direction.

M. Air Carrier and Aerodrome Assessments

Proposed section 4.86 authorizes the Minister to conduct aviation security assessments, outside Canada, of air carriers that operate or intend to operate flights to Canada or of facilities relating to the operations of those carriers. Currently, the Act is silent on the authority of the Minister and departmental inspectors outside of Canada, although departmental officials point out that this is current practice with notice to and/or approval of foreign authorities.

N. Verifying Compliance and Testing Effectiveness

Departmental inspectors and operator personnel are required, from time to time, to conduct tests to verify compliance with security requirements and the effectiveness of current equipment, systems and processes, for example, trying to clear security with weapons. Proposed section 4.87 makes clear that a person authorized to conduct such compliance and other testing does not commit an offence if the person does something that would otherwise be unlawful. The current Act does not address this issue.

O. Restrictions and Prohibitions for Safety or Security Purposes

The authority in section 5.1 of the current Act to issue notices to close or restrict access to airspace is limited to situations where the prohibition or restriction is necessary to ensure aviation safety, for example, closing airspace related to the conduct of airshows. Clause 8 of the Bill amends section 5.1 by adding references to aviation "security" and the "protection of the public" as grounds for issuing notices to close or restrict access to airspace.

P. General Provisions Respecting Regulations, Orders, etc.

Clause 9 makes a number of amendments to section 5.9 to put security measures and emergency directions on the same footing and subject to the same procedural authorities and requirements as regulations and orders made under the Act.

Clause 10 amends section 6.2 of the Act so as to make security measures, emergency directions and other instruments exempt from certain requirements of the *Statutory Instruments Act*. This allows them to be made on an urgent basis and ensures their confidentiality. The *Aeronautics Act* currently makes "orders" containing security measures exempt from the requirements of the *Statutory Instruments Act*.

Proposed section 6.2(2) provides that no person shall be found to have contravened an unpublished security measure or emergency direction (or the other instruments listed in section 6.2(1)) unless it is proved that the person was notified of the measure or direction or that reasonable steps were taken to bring its contents to the notice of the persons likely to be affected by it.

Q. Interim Orders

Currently, the Act (in section 6.41) authorizes interim orders to be issued only to give immediate effect to recommendations of the Transportation Safety Board or of other persons authorized to investigate an aviation accident or incident. The Act does not currently authorize the Minister to delegate his or her authority to issue interim orders, nor does it require consultations on interim orders before they are made.

Clause 11 (proposed section 6.41) permits the Minister to make an interim order that contains any provision that may be contained in a regulation made under Part I of the *Aeronautics Act* (a) to deal with a significant risk, direct or indirect, to aviation safety or the safety of the public, (b) to deal with an immediate threat to aviation security, the security of any aircraft or aerodrome or other aviation facility or the safety of the public, passengers or crew members, or (c) for the purpose of giving immediate effect to any recommendation of any person or organization authorized to investigate an aviation accident or incident. As well, the Minister may delegate to his or her deputy the authority to make, for any of the reasons cited above, an interim order that contains any provision that may be contained in a regulation made under Part I

of the Act.[2] Before making an interim order the Minister or deputy, as the case may be, must consult with appropriate persons or organizations.

The *Aeronautics Act* currently provides that an interim order has effect from the day on which it is made, and ceases to have effect 14 days after it is made unless it is approved by the Governor in Council within the 14-day period. Where the Governor in Council approves an interim order, the Minister must, as soon as possible after the approval, recommend to the Governor in Council that a regulation having the same effect as the interim order be made under Part I, and the interim order ceases to have effect (a) where such a regulation is made, on the day that the regulation comes into force, and (b) where no such regulation is made, two years after the day on which the interim order is made. Bill C-17 changes that two-year period to one year.

Under proposed section 6.41, an interim order must be published in the *Canada Gazette* within 23 days after the day on which it was approved. In addition, a copy of each interim order must be tabled in each House of Parliament within 15 days after it is made. The interim order may be sent to the Clerk of the House if the House is not sitting.

R. Measures Relating to Canadian Aviation Documents

Clause 13 makes a number of amendments to section 7 of the Act, the only substantive one being the amendment to section 7(7), which sets out what the Tribunal can decide when it holds a review hearing under section 7(1) concerning a suspension made by the Minister. If the Minister's decision relates to a person's designation under proposed section 4.84 to conduct screenings, the Tribunal can confirm the Minister's decision or refer the matter back to the Minister for reconsideration; if the Minister's decision relates to any other Canadian aviation document, the Tribunal can confirm the Minister's decision or substitute its own decision. The department does not consider it appropriate that the Tribunal be the final authority on whether a person conducting screening poses an immediate threat to aviation security.

Clause 14 makes housekeeping amendments to section 7.2 of the Act (respecting Tribunal appeals), consequential to the amendments effected by clause 13. At both the review-level hearing and the appeal-level hearing, the Tribunal is limited to confirming the department's suspension under section 7, or referring it back to the department for reconsideration, when the case involves the Minister's suspension of a person's designation to conduct screenings.

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(2) In its original form the Minister could delegate the authority to make an interim order to any officer of the department. This was restricted in Committee to the deputy.

S. Prohibitions, Offences and Punishment

Clause 17 adds a new section 7.41 to address unruly and dangerous acts committed on board aircraft in flight. It creates the offence of endangering the safety or security of an aircraft in flight or of persons on board an aircraft in flight by intentionally interfering with the performance of the duties of any crew member, lessening the ability of a crew member to perform his or her duties, or interfering with any person who is following the instructions of a crew member. The section imposes heavy penalties.

T. Procedure Relating to Certain Contraventions

Clause 18 amends section 7.6(1)(a) to include references to "any provision of this Part" (of the Act), and to "security measures." The purpose of the amendment is to allow offence-creating provisions of the Act and of the security measures to be designated as being subject to the administrative monetary penalty scheme set out in sections 7.7 to 8.2 of the Act. The Act does not currently provide for administrative monetary penalties to be assessed for contraventions of the Act. Administrative monetary penalties may currently be assessed for contraventions of security measures, but, according to department officials, this is done indirectly through the requirement in the regulations to comply with an order authorized to be made pursuant to section 4.3(2).

Proposed paragraph (a.1) is being added to section 7.6(1) to allow for a maximum penalty of $50,000 for failure to provide information requested under proposed sections 4.81(1) and 4.82(4) and (5).

Clause 19 amends section 8.3(1)(a) of the Act to make a reference to aviation security so that aviation *security* considerations, as well as aviation *safety* considerations, are taken into account when considering whether enforcement notations should be expunged from an individual's or a company's records.

U. Enforcement

Clause 20 amends section 8.5 of the Act to extend the "due diligence" defence to contraventions of security measures and emergency directions, neither of which is referred to in the current Act.

Clause 21(1) amends section 8.7(1)(a) of the Act to include a reference to "audits" and to clarify that departmental inspectors can enter into an aviation facility or any premises used

by the Canadian Air Transport Security Authority not only for the purpose of conducting an inspection of the aerodrome or facility, but also for the purpose of conducting an inspection or audit of a third party. Clause 21(2) adds a new section 8.7(1.1) to clarify the Minister's authority to have access to systems, records and equipment, for the purposes of an inspection or audit.

Clause 22 adds a new section 8.8 to the Act, requiring persons who are in possession or control of places being inspected or audited, and persons found therein, to provide the Minister with all reasonable assistance and relevant information. The amendment is complementary to that in clause 19 and ensures that the department's inspectors will be provided with such assistance and information as may be required for inspection and audit purposes.

V. Schedule

Clause 23 adds the schedule, referred to in proposed section 4.81, to the *Aeronautics Act* in order to set out the passenger information that is to be provided to the Minister under that provision. As noted earlier, the section permits the Governor in Council, on the recommendation of the Minister of Transport, to amend the schedule.

PARTS 1, 3, 6, 9, 10, 15, 18, 20, 21, 22: INTERIM ORDERS

Eight parts of the Bill amend various statutes to provide a new power permitting the responsible Minister to make interim orders in situations where immediate action is required. Two other parts, dealing with the *Aeronautics Act* and the *Canadian Environmental Protection Act, 1999*, extend the power of the Minister to make such orders. The statutes being amended to introduce the power, and the respective Ministers, are:

- *Department of Health Act* – Minister of Health;
- *Food and Drugs Act* – Minister of Health;
- *Hazardous Products Act* – Minister of Health;
- *Navigable Waters Protection Act* – Minister of Fisheries and Oceans;
- *Pest Control Products Act* – Minister of Health;
- *Quarantine Act* – Minister of Health;
- *Radiation Emitting Devices Act* – Minister of Health; and
- *Canada Shipping Act*; *Canada Shipping Act, 2001*[3] – Ministers of Transport and Fisheries and Oceans.

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(3) The latter Act received Royal Assent on 1 November 2001 and will largely repeal the *Canada Shipping Act*.

With the exception of the extension of powers under the *Aeronautics Act* (Part 1 of the Bill) and the *Canadian Environmental Protection Act* (CEPA, Part 3 of the Bill), the interim order provisions follow a similar pattern:

- The Minister may make an interim order on a matter that would otherwise be required to be made, in a regulation or otherwise, by the Governor in Council.
- An interim order may be made if the Minister believes that immediate action is required to deal with a significant risk, direct or indirect, to human life, health, safety, security, or the environment, depending on the statute.
- An interim order must be published in the *Canada Gazette* within 23 days.
- An interim order ceases to have effect after 14 days (compared to 45 days in Bill C-55 and 90 days in Bill C-42) unless it has been, variously, confirmed by the Governor in Council, repealed or has lapsed, or been replaced by an identical regulation; even if approved by the Governor in Council, the maximum time an interim order may remain in effect is one year.
- A copy of each interim order must be tabled in each House of Parliament within 15 days after it has been made. Tabling with the Clerk will suffice if the House is not then sitting.[4]
- A person who contravenes an interim order that has not yet been published in the *Canada Gazette* cannot be convicted of an offence unless the person has been notified of the order, or unless reasonable steps have been taken to inform those likely to be affected by it.
- Interim orders are exempt from certain requirements of the *Statutory Instruments Act*, the most important of which are:
    - The requirement for lawyers in the Regulations Section of the Legislative Services Branch of the Department of Justice to examine proposed regulations to see if they: are authorized by the statute; are not an unusual or unexpected use of the statutory authority; do not trespass unduly on existing rights and freedoms and are not inconsistent with the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights* (although, of course, both would continue to apply); and meet required drafting standards.[5] If flaws are found, proposed regulations are referred back to the originating department for consideration.

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(4) In Bill C-55, the requirement was for "15 sitting days." The change ensures the interim orders are tabled even if Parliament is adjourned, prorogued or dissolved. Bill C-42 had no tabling requirements. The tabling requirement responds to criticism of the previous bills concerning the lack of parliamentary oversight.

(5) The Act's actual wording requires the examination to be conducted by the Clerk of the Privy Council in consultation with the Deputy Minister of Justice.

- The requirement to transmit regulations within seven days of their making to the Clerk of the Privy Council for registration.[6]

As noted above, the existing power of the Minister of Transport under the *Aeronautics Act* to make interim orders would be broadened. Currently, the Minister may make such orders for the purpose of giving immediate effect to any recommendation arising from the investigation of an air accident or incident where such an order is necessary for air safety or the safety of the public. Bill C-17 broadens that power to cover any situation that presents a significant risk, direct or indirect, to aviation safety or the safety of the public and to deal with immediate threats to aviation security and the security of aircraft or facilities. It also permits the power to be delegated to any officer of the department, subject to any limitations that the Minister may specify. Another new aspect is the requirement to consult with any person or organization considered appropriate before making the interim order.

The time limitations placed on the existing power to issue interim orders are retained for the broadened power, and Bill C-17 brings them into line with the interim order powers in other statutes.[7] The same exemptions from the *Statutory Instruments Act* that were outlined above for the new powers are contained in the existing *Aeronautics Act*, and the Bill continues them. The requirement to table any interim orders under this Act in Parliament is new.

The *Canadian Environmental Protection Act, 1999* already permits the Minister to make interim orders where immediate action is required to deal with significant dangers.[8] Bill C-17 adds that power to Part 8, Environmental Matters Relating to Emergencies. The interim orders may last only 14 days if not confirmed by the Governor in Council, but if confirmed, may last for a maximum of two years (compared to one year for interim orders in other statutes). The CEPA provisions also require a commitment to consult with affected governments and other federal ministers before the Governor in Council may approve an order. This parallels existing provisions elsewhere in the Act. Bill C-17 also includes a requirement that interim orders under CEPA be tabled in Parliament.

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(6) A regulation is "made" when it is signed by the authority designated to make it.

(7) Under the *Aeronautics Act*, an interim order may already remain in force for only 14 days unless approved by the Governor in Council in that period. However, under the existing Act, an order approved by the Governor in Council may remain in force for two years. Bill C-17 changes that to one year.

(8) The dangers relate to toxic substances, international air pollution, and international water pollution.

As is the case now, interim orders are exempted from certain provisions of the *Statutory Instruments Act* outlined above. It is noteworthy that in several (but not all) of the existing circumstances in CEPA where the Minister may make interim orders, there is an explicit instruction to include in the required annual report, a report on the administration of the Division in which the power is found. This requirement is not found in the Bill C-17 amendment.

In assessing the provisions governing interim orders, the following points are worth reiterating:

- Ministerial powers to make interim orders when immediate action is required are not entirely new in federal statutes.
- The new provisions now have the same duration as the existing ones before requiring confirmation by the Governor in Council (that is, 14 days).
- If confirmed, but not made the subject of a regulation, an interim order may last no longer than one year in all statutes except for CEPA, where it is two years.
- The same exemptions from the *Statutory Instruments Act* that apply now to the *Aeronautics Act* and CEPA will apply to the statutes that have not to this point contained a power to make interim orders.

PART 2: *CANADIAN AIR TRANSPORT SECURITY AUTHORITY ACT* (CLAUSES 24-25)

Clause 24 amends the definitions of "screening" and "screening point" in section 2 of the *Canadian Air Transport Security Authority Act* to include emergency directions made under the *Aeronautics Act*. The reason for the amendment is that proposed sections 4.76 and 4.77 of the *Aeronautics Act* authorize the making of emergency directions in the event of an urgent security situation (the Act does not currently refer to emergency directions). The *Canadian Air Transport Security Authority Act* is therefore being amended to add the requirement to comply with such emergency directions as they relate to the delivery of screening services in Canada.

Clause 25 replaces section 29 of the Act to permit the Canadian Air Transport Security Authority to enter into agreements with the operators of aerodromes designated by regulations, for the purposes of contributing to the costs of policing at those aerodromes. The Act currently authorizes the Authority to enter into such agreements only with designated airport authorities as defined in the *Airport Transfer (Miscellaneous Matters) Act*.

PART 4: HOAXES REGARDING TERRORIST ACTIVITY (CLAUSE 32)

Part 4 (clause 32) of the Bill creates new *Criminal Code* offences (s. 83.231) dealing with hoaxes regarding terrorist activity. It is identical to the corresponding provision of Bill C-55.

"Terrorist activity" is defined in section 83.01(1) of the *Criminal Code*, which was enacted in December 2001 as part of the *Anti-Terrorism Act*, S.C. 2001, c. 41 (formerly Bill C-36). Under that definition, terrorist activity encompasses acts or omissions done inside or outside Canada:

- which amount to offences under a series of international conventions dealing with such things as the safety and security of aviation, maritime navigation, and internationally protected persons, as well as the protection of nuclear material, and the suppression of terrorist bombings and terrorist financing; or

- which involve the intentional causing of death or serious bodily harm by violence, the endangering of a life, the causing of serious risk to public health or safety, the causing of substantial property damage, or the causing of serious interference with an essential service, facility, or system, where such acts or omissions are done in whole or in part for political, religious, or ideological reasons, and with the intention of intimidating the public or compelling a government or organization to do or refrain from some act.

This definition of "terrorist activity" expressly excludes ordinary acts of advocacy, protest, dissent, work stoppage, or the expression of political, religious or ideological thoughts, beliefs or opinions *per se*.

The new hoax offences cover those who, without lawful excuse, and with the intent of causing any person to fear death, bodily harm, substantial property damage, or serious interference with use or operation of property:

- cause information to be conveyed, without believing in its truth, or

- commit some other act

that, "in all the circumstances, is likely to cause a reasonable apprehension that terrorist activity is occurring or will occur" (s. 83.321(1)).

Where death or injury do not result, the new offences are punishable by a maximum sentence of imprisonment for five years, if prosecuted by indictment, or imprisonment for up to six months and/or a maximum fine of $2,000 on summary conviction (s. 83.321(2)). If a person causes bodily harm to another by such a hoax, the person is liable to imprisonment for up to ten years on indictment, or for up to eighteen months on summary conviction (s. 83.321(3)). Where the death of a person is caused by such a hoax, the offence is punishable by life imprisonment (s. 83.321(4)).

The new terrorist hoax offences are intended to fill a gap in the existing criminal law. Real acts of terrorism are already crimes in Canada. For some hoaxes, it may be possible to lay charges under existing provisions of the *Criminal Code*, such as those pertaining to public mischief (s. 140), false messages (s. 372), and mischief to property (s. 430(1)). However, these offences do not directly address the problem of hoaxes, such as terrorism-related hoaxes, that have the potential to cause public panic, system disruptions, or waste and misallocation of critical security and other resources, on a significant scale.

PARTS 5 AND 11: *DEPARTMENT OF CITIZENSHIP AND IMIGRATION ACT*; *IMMIGRATION AND REFUGEE PROTECTION ACT* (CLAUSES 33 AND 70-72)

These provisions were not included in either Bill C-42 or Bill C-55.

The *Department of Citizenship and Immigration Act* currently permits the Minister, with Cabinet's approval, to enter into *agreements* with provinces, foreign governments and international organizations to facilitate the formulation, coordination and implementation of departmental policies and programs. Thus, agreements could be entered into, for example, relating to immigration enforcement. Bill C-17 adds to that list "the collection, use and disclosure of information" as matters that may be included in an agreement. It also adds a provision permitting the Minister to enter into *arrangements* that cover exactly the same ground. Arrangements are less formal than agreements, and Cabinet approval is not required.

For example, Citizenship and Immigration Canada currently has an arrangement with the United States for immigration enforcement purposes. Information is disclosed based on

section 8(2)(f) of the *Privacy Act*, which permits disclosure of personal information "under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation." The provisions of Bill C-17, therefore, would make that authority to disclose information express by adding it to the *Department of Citizenship and Immigration Act*.

Section 148(1)(d) of the *Immigration and Refugee Protection Act* (IRPA) currently permits the government to make regulations requiring transportation companies to provide specified information, including documentation and reports. The regulations authorize any officer to have access to a commercial transporter's reservation system, or to request in writing all reservation information on passengers to be carried to Canada. In addition, commercial transporters are required to provide the following information, when requested:[9]

After arrival:

- a copy of any ticket issued to a person;
- a person's itinerary;
- information about a person's travel or identity document; and
- a crew list.

Before arrival, the following information on each person carried:

- name;
- date of birth;
- the country that issued the person's passport or travel document (or if none, the person's country of nationality);
- gender;
- passport or travel document number; and
- reservation number.

The Act provides that the information may be used only for immigration purposes, or to identify a person for whom a Canadian arrest warrant exists. The person to whom the information relates must be given notice of the use of the information.

Bill C-17 enables regulations to be made to provide for the collection, retention, disposal and disclosure of information for the purposes of the *Immigration and Refugee Protection Act*. It also extends the uses to which the information collected may be put.

(9) IRPA Regulations, sections 264-270.

Regulations may be made for the disclosure of information for the purposes of national security, the defence of Canada, or the conduct of international affairs, including purposes pursuant to either an agreement or an arrangement reached by the Minister under the new authority in the *Department of Citizenship and Immigration Act* mentioned above. Regulations of this type have to be tabled in Parliament and referred to the appropriate committee of each House.

PART 7: *EXPLOSIVES ACT* (CLAUSES 35-51)

Part 7 of Bill C-17 is identical to Part 6 of Bill C-55. It amends the *Explosives Act* to implement the *Organization of American States Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials* as it relates to explosives and ammunition. It prohibits illicit manufacturing of explosives and illicit trafficking in explosives and components of ammunition. It allows for increased control over the import, export, transportation through Canada, acquisition, possession and sale of explosives and certain components of explosives, and provides increased penalties for certain offences. Canada signed the Convention in 1997.

In its original form, the Bill would have broadened the application of the *Explosives Act* to include "restricted component" and "inexplosive ammunition component." A number of sections in the Act were to be amended accordingly. The effect was to make provisions in the existing Act applicable not only to the explosive material that is part of ammunition but also to cartridge cases, bullets and other projectiles. The Legislative Committee, however, removed all references to inexplosive components. The Bill also amends the Act by expanding the scope of its application to include acquisition, exportation and transportation through Canada, in addition to manufacture, sale, storage and importation.

As well as the changes proposed to the wording of existing sections, some new and more substantial sections are proposed that establish new rules regarding the possession of explosives and any restricted component (clause 38), and the banning of illicit trafficking in explosives (clause 39). Under clause 38, it is forbidden to possess any restricted component in addition to the current prohibition on the possession of explosives, unless authorized by the Act or any exemption. The Governor in Council may make regulations prescribing a component of an explosive and providing that only a stipulated person or body, or a class of persons or bodies,

has the right to acquire, possess or sell such a component (clause 37(1)). However, clause 37(2), and the new section 6(2) proposed in clause 38(5), authorize the Minister to exempt any body or person, or any class of persons or bodies, from the ban on possessing explosives or restricted components of explosives, as provided in clause 38(3). Clause 39 introduces new prohibitions designed to counter illicit trafficking in all its forms (acquiring, selling, transporting) of explosives.

Clause 40 replaces section 9 of the *Explosives Act*. The current requirement for a permit to import explosives is extended to export and transportation through Canada. Clauses 41 and 42 extend inspection and seizure measures to cover restricted components. Breaches of the law would be punishable by considerably higher maximum penalties. For example, fines that used to be up to $5,000, $10,000 or $20,000 can now go as high as $250,000 or $500,000 depending on the type of offence. Imprisonment for terms of up to two or five years is also available.

Some individuals, such as hunters and other firearms groups, in particular those who make their own ammunition, raised concerns about the proposed expansion of the scope of the *Explosives Act*, especially through the new definitions. Their main concern centred on the fact that some of the provisions of the existing Act, as well as new measures in the Bill, would apply not only to explosives as defined in the Act but also to restricted components of explosives (which are to be prescribed by regulation) and inexplosive components of ammunition. **As noted, this extension to inexplosive components was deleted by the Legislative Committee.**

PART 8: *EXPORT AND IMPORT PERMITS ACT* (CLAUSES 52-65)

Clauses 52 to 65 (51 to 64 in Part 7 of Bill C-55, and 48 to 61 in Part 6 of Bill C-42) amend the *Export and Import Permits Act*, which gives the Government the power to establish an Export Control List in order to control the export of certain goods. One reason for establishing such a list was the need to control the export of weapons and munitions as well as any article of a strategic nature that could be used in a manner detrimental to Canada's security. Canada must also control exports to meet its international commitments to prevent, among other things, the proliferation of missile technology as well as biological, chemical and nuclear weapons. Furthermore, Canada has certain obligations concerning the export of goods it obtains

from the United States; these obligations include ensuring that they do not reach countries that may use them improperly and contribute to regional or international instability. In the wake of the 11 September 2001 attacks, the Government decided to amend the *Export and Import Permits Act* to give itself the explicit power to control the transfer as well as the export from Canada of technology; the Minister of Foreign Affairs and International Trade is expressly directed to consider international peace, security or stability as criteria for export or transfer permits. The measures are also a response to Resolution 1373 passed by the Security Council of the United Nations; among other things, that resolution declared that all countries should contribute to efforts to eliminate the supply of weapons to terrorists.

Clause 52 changes the long title of the *Export and Import Permits Act* by adding the words "and transfer of goods and technology." Indeed, most of the clauses in Part 7 basically add the words "transfer" and "technology" to various sections of the Act. Thus, clause 53 indicates that technology as well as goods will be identified in the Export Control List as defined in subsection 2(1), while clause 54 amends section 3 so that the list covers transfers as well as exports. Clause 53(2) states that the word "technology" covers technical data, technical assistance and information necessary to develop, produce or use an article included in the list. It also defines "transfer" as the disposal or disclosure of technology. Clause 55 adds "transfer" and "technology" to section 4, which gives the Governor in Council the authority to establish an Area Control List to identify the countries covered by export controls.

The remaining clauses are largely technical and consequential. Of note, however, is the provision in clause 56 that the Minister may consider the safety or interests of Canada, or peace, security or stability elsewhere in the world in deciding to issue a permit. The term "safety or interests" of Canada is made more precise by reference to the activities listed in paragraphs 3(1)(a) to (n) of the *Security of Information Act*, all of which seriously harm Canada or Canadians.

PART 12: *MARINE TRANSPORTATION SECURITY ACT* (CLAUSE 73)

Clause 69 amends the *Marine Transportation Security Act* by adding a new section 11.1 to permit the Minister of Transport, under certain conditions, to enter into agreements respecting security of marine transportation and to make contributions or grants in

respect of the cost or expense of actions to enhance security on vessels or at marine facilities. Such financing is currently prohibited under the *Canadian Marine Act*. (American port authorities are able to receive money to increase port security.) The provision ceases to apply three years after the day on which it comes into force.

PART 13: *NATIONAL DEFENCE ACT* (CLAUSES 74-81)

A. Controlled Access Zones

The amendments to the *National Defence Act* are almost exactly the same as those contained in Bill C-55 except for the removal of all provisions concerning the establishment of "Controlled Access Military Zones." Like the provisions in Bill C-42 for the establishment of military security zones, the power to designate a controlled access military zone proposed by Bill C-55 raised considerable controversy. For example, it was suggested that clause 84 in Bill C-42 would have allowed the Minister of National Defence to designate the area where an international summit meeting was taking place as a military security zone. Bill C-55 limited the areas where a controlled access military zone could be designated to a defence establishment, property outside of a defence establishment provided for the Canadian Forces and the department, and a vessel, aircraft or other property of a visiting military force. Nevertheless, the power to designate such zones as proposed by C-55 still raised concerns.

The Government still considered it necessary to establish such zones in some locations, given concerns about the security of Canadian and visiting warships in Canadian naval ports. Thus, while removing the provisions concerning zones from the legislation, it decided to establish what it now calls Controlled Access Zones in Halifax, Esquimalt, and Nanoose Bay harbours through an Order in Council; however, it has left the door open for the establishment of such zones in other locations if the security situation requires it. The Government has suggested that the scope of these Controlled Access Zones will be narrower than what was proposed in Bills C-42 and C-55. **The legal authority for establishing these zones is the Royal Prerogative.**

B. Definitions

Clause 74 changes the definition of the words "emergency" and "Minister" in subsection 2(1) of the *National Defence Act*. The current definition of emergency in the Act includes war, invasion, and a riot or insurrection, real or apprehended, as situations in which an emergency is deemed to exist. When there is an emergency, various sections of the Act can put the Canadian Forces on an operational footing. However, it was considered necessary to add "armed conflict" to the list because "war" is considered a formally declared war, whereas armed conflicts can exist without formal declarations of war. As for the word "Minister," which in the Act usually refers to the Minister of National Defence, the addition of a new Part VII, which provides for the establishment of a job protection mechanism for Reservists, makes an exception. With regards to the new Part VII, the Minister in question can be a Minister other than the Minister of National Defence.

C. References to the North American Aerospace Defence Command Agreement

Subsection 16(1) of the Act currently authorizes the Governor in Council to establish and authorize the maintenance of a component of the Canadian Forces, called the special force, to deal with an emergency under the *Charter of the United Nations* and the *North Atlantic Treaty*. Clause 75 amends subsection 16(1) mainly by adding the words "North American Aerospace Defence Command Agreement." This amendment to subsection 16(1) reflects the important role played by the North American Aerospace Defence Command (NORAD) Agreement between Canada and the United States in continental and homeland defence. Increased emphasis has been put on the surveillance by NORAD of Canadian and U.S. airspace since the 11 September 2001 attacks as well as on various measures, often grouped under the term "homeland defence," to prevent or to deal with the consequences of terrorist attacks within North America. Although NORAD activities were covered by the words "any other similar instrument" in subsection 16(1), the direct reference to NORAD in the amended version highlights the importance of NORAD in efforts against terrorism.

Similarly, clause 76 amends subsection 31(1), which authorizes the Governor in Council to place Canadian Forces personnel on active service anywhere in and beyond Canada in an emergency, to defend Canada or in consequence of actions undertaken under the UN Charter and the *North Atlantic Treaty* or other similar instruments. The amendment adds the NORAD

Agreement to that list and also places the United Nations in a separate category in recognition of its special status as something more than a collective security organization.

D. Reserve Military Judges Panel

Clause 77 adds sections 165.28 to 165.32 to the *National Defence Act* in order to establish the Reserve Military Judges Panel. The amendment's goal is to make more military judges available to meet rising demands for judicial services, especially as a result of the increased tempo of military operations since the terrorist attacks of September 2001. The amendment allows the Governor in Council to name to the panel officers who are members of the Reserves and who have previously performed the duties of a military judge.

Under new section 165.31, it is the Chief Military Judge who, as supervisor of all the military judges in the Forces, selects Reserve officers from the panel to perform the duties of military judges. The Office has been faced with a shortage of military judges for some time, as indicated by its document entitled "Level 1 Strategic Letter" dated 31 October 2000. There has been some concern that the shortage of military judges could cause delays in the scheduling of trials, and the employment of Reserve judges was viewed as one option to avoid such a situation. Because military judges can be called upon to preside at courts martial in operational theatres, the deployment of Canadian Forces units as part of international efforts against terrorism raises the possibility of even greater demands on the existing pool of military judges.

E. Computer Systems and Networks and Commissioner of the Communications Security Establishment

Clause 78 creates a new Part V.2 of the Act, dealing with the interceptions of communications involving the Department of National Defence (DND) or Canadian Forces computer systems. This new provision ensures that DND and the Canadian Forces have the authority to protect their computer systems networks and the information they contain from attack or manipulation. The vulnerability of computer systems to interference and outright attacks has been a growing concern in recent years, especially within military forces, which are increasingly dependent on information technology for success on the battlefield and for carrying out other operations. Although various measures have been taken to protect the computer systems used by the department and the Forces from intrusions from outside sources, protection

is also needed against actions from within the department or Forces that can accidentally or deliberately damage the systems. For example, someone from outside the department or the Forces could send an e-mail which could subsequently damage military computer systems or networks, or someone within the department or the Forces could sabotage systems or networks or use them for purposes which contravene the Code of Military Discipline or the *Criminal Code*.

New section 273.8 allows the Minister of National Defence to authorize in writing public servants in the department or persons acting on behalf of the department or the Forces who operate, maintain or protect computers and networks to intercept private communications. Sections 273.7(1) and (2) in Bill C-42 described the private communications as "originating from, directed to or transiting through any" computer system or network. Sections 273.8(1) and (2) in Bill C-55 and now Bill C-17 go into greater detail, since they state that these communications are "in relation to an activity or class of activities specified in the authorization, if such communications originate from, are directed to or transit through" any computer system or network.

The interception can be carried out only in order to identify, isolate or prevent (a) the unauthorized use of, interference with, or damage to departmental and military computer systems or networks, and (b) damage to the data they contain. Compared to Bill C-55, Bill C-17 is more specific. Bill C-55 referred to the unauthorized use of, interference with, or damage to systems, networks, or the data they contain. In Bill C-17, the words "any damage to" were added in front of the words "the data that they contain" at the end of sections 273.8(1), 273.8(2), 273.8(3)(a), 273.8(3)(d), and 273.8(9)(a). The new wording and the comma added after the word "networks" imply that intercepts can be carried out in order to identify, isolate or prevent damage to data as well as the unauthorized use of, interference with, or damage to system or networks. The Minister may authorize in writing interceptions by public servants employed in the department or any person acting on behalf of the department or the Canadian Forces. The Minister may also authorize in writing the Chief of the Defence staff to direct military personnel to carry out interceptions. In either case, the Minister must be satisfied that certain conditions are met. These are that:

- the interception is necessary to identify, isolate or prevent (a) "any harmful" unauthorized use of, "any" interference with, or "any" damage to the systems or networks, or (b) damage to the data, and that measures are in place to ensure that only information that is essential for

these purposes will be used or retained (the wo[illegible] within quotation marks are in sections 273.8(1), (2) and (3) of Bill C-17, as well as in Bill C-55, but were not in the corresponding sections in Bill C-42);

- the information cannot be reasonably obtained by other means; and
- measures are in place to protect Canadians' privacy in the use or retention of the information.

According to section 273.8(4), authorizations may contain conditions to protect the privacy of Canadians. While Bill C-42 mentioned information "derived from" private communications, Bill C-17, like Bill C-55, says "contained in." Authorizations or renewals are for periods not exceeding one year. Part VI of the *Criminal Code*, which otherwise prohibits the interception of private communications occurring within Canada, does not apply. In addition, according to section 273.8(9), government officials are not civilly liable for improper disclosure or use of intercepted information under section 18 of the *Crown Liability and Proceedings Act*.

During the First Session of the Thirty-seventh Parliament, some amendments to the *National Defence Act* were also made in Bill C-36, the *Anti-terrorism Act*. Thus, clause 78 also adds new section 273.9 to the Act. The new section indicates the duties of the Commissioner of the Communications Security Establishment (CSE) with regard to the interception of communications originating from, directed to, or transiting through departmental or military computer systems and networks. The Commissioner of the CSE has jurisdiction to: review the activities of the department and the Forces to ensure compliance with the law, and to report annually to the Minister on the review; undertake an investigation in response to a complaint; and inform the Minister of National Defence and, if appropriate, the Attorney General if any activity of the department or the Forces does not appear to be in compliance with the law.

F. Amended Procedures for Provincial Requests for Military Assistance

Clause 79 amends section 278 in Part VI (Aid to the Civil Power), which deals with the call-up of the Canadian Forces "for the purpose of suppressing or preventing any actual riot or disturbance or any riot or disturbance that is considered as likely to occur." At the present time, when the attorney general of a province requests the help of the Forces to aid the civil power, the Chief of the Defence Staff (CDS) (or an officer designated by the CDS) can call up the number of military personnel and units considered necessary to deal with the actual or likely

riot or disturbance. Clause 79 amends section 278 by adding the words "subject to such directions as the Minister considers appropriate in the circumstances and in consultation with that attorney general and the attorney general of any other province that may be affected..." The purpose of the amendment is to allow the Minister of National Defence to give some direction to the CDS when dealing with a request for assistance from a provincial attorney general, for example in the case of simultaneous requests for aid from other provinces.

G. Protection of Civil Employment of Reservists

Clause 80 adds new sections 285.01 to 285.13, designed to protect the jobs of Reservists called up on service "in respect of an emergency," defined as an insurrection, riot, invasion, war and, in the wake of the amendment of section 2 as indicated by clause 74, an armed conflict. The new provisions do not cover Reservists' non-emergency service. It is worth noting that a compulsory call-up of the Reservists has not occurred in approximately 50 years.

The new sections 285.02 to 285.06 cover the obligation for an employer to reinstate a Reservist called up on duty, as well as other issues such as employee benefits. Under new section 285.06, an employer cannot terminate the employment of a reinstated Reservist for a period of one year without reasonable cause. New section 285.03 offers another level of protection for Reservists who might return from the period of full-time duty requiring hospitalization for injuries or who are physically or mentally incapable of performing the duties of their civil employment. It indicates that the period of hospitalization or incapacity, up to a maximum of time specified in the regulations, will be deemed to be part of the period of the Reservist's service. As a result, Reservists who are injured or who are otherwise unable to carry out the duties of their civilian job and get the pay and benefits which go with it, will not be left high and dry because they will continue to have access to the benefits available to them during military service. New sections 285.08 to 285.11 specify the offences and the punishments for employers who do not reinstate Reservists returning after a compulsory call-up.

With regard to the implementation of the new provisions for Reservists, section 285.13 directs the Minister to consult with provincial governments as well as relevant persons, associations, bodies and authorities. As noted previously, for the new Part VII, the Minister involved can be someone other than the Minister of National Defence.

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Measures to protect the jobs of Reservists have been the subject of debate for a number of years in Canada. To date, the Department of National Defence has relied on the work of the Canadian Forces Liaison Council to educate employers on the roles and value of Reservists and to encourage them to voluntarily reinstate Reservists absent because of training and military operations. Without job protection, some Reservists called up for compulsory service might find themselves in a difficult situation where they would have to choose between losing their jobs because of a long absence to carry out their military duties or breaking the law if they ignore the call-up order. As a result, a number of the Reservists on which the military counted might not report for duty following a call-up, thereby hampering Canada's ability to respond to a national or international emergency. Thus, job protection has benefits for both Reservists and the military chain of command. The war against terrorism and the increased possibility that Canada might face a major emergency no doubt encouraged the Department of National Defence to put in place a job protection mechanism. Such legislative protection for Reservists has already been adopted in other allied countries, and in some cases (such as the United States) the protection is broader and covers training and voluntary deployments.

Despite the creation of the new job protection, the Canadian Forces Liaison Council and others will no doubt continue their efforts to educate employers on the role played by Reservists and on the value of voluntarily protecting their jobs. Over the years, some have argued against legislated job protection out of concern that a number of employers might be reluctant to hire Reservists because they might have to be absent for long periods of time. However, the new Part VII protects civil employment only when Reservists are called up for full-time service during an emergency, something that has not occurred since World War II. In other words, employers will likely recognize that the call-up of Reservists would occur only in exceptional circumstances and that there is little point in discriminating against Reservists because of this. At the same time, given the war against international terrorism and the possibility that Canada might one day face a major emergency, there are benefits in amending the *National Defence Act* to provide job protection, if only to reassure Reservists that their jobs will be protected if and when they are called up.

PART 14: *NATIONAL ENERGY BOARD ACT* (CLAUSES 82-93)

Part 14 of Bill C-17 amends the *National Energy Board Act* by extending the Board's powers and duties to include matters relating to the security of pipelines and international power lines. It authorizes the Board, with the approval of the Governor in Council, to make regulations respecting the security of pipelines and international power lines. It gives the Board the authority to waive the requirement to publish notice of certain applications in the *Canada Gazette*, if there is a critical shortage of electricity. It also authorizes the Board to take measures in its proceedings and orders to ensure the confidentiality of information that could pose a risk to security, in particular the security of pipelines and international power lines.

Clause 82 of the Bill enlarges the scope of the existing section 16.1 on confidentiality of information by applying the same rules to the security of energy transportation infrastructures. When it comes to disclosure of information, the amended *National Energy Board Act* embodies the principle that the interests of the undertakings concerned and the security of the infrastructures outweighs the public interest in disclosure.

Clause 83 adds the safety and security of pipelines and international power lines to the list of matters that the Board may keep under review, study, and report and make recommendations on to the Minister. The Board may also advise Ministers, officers and employees of any government department, ministry or agency, whether federal, provincial or territorial.

Under clause 84, the Board may order a company responsible for the operation of a pipeline, or the holder of a certificate for an international power line, to take appropriate steps to ensure the security of that pipeline or power line. With respect to the construction and operation of a power line, clause 87 introduces a waiver by the Board for the obligation normally incumbent upon an applicant to publish a notice of application in the *Canada Gazette*, if the Board considers that there is a critical shortage of electricity. The same provision is added to section 119.04 of the existing Act, with respect to applications to export electricity (clause 92). The waiver is conditional on the critical shortage being caused by terrorist activity.

Lastly, clause 93 of the Bill adds a new section (131(1)) to the existing general provisions, under which the Board may make regulations respecting the security of pipelines and international power lines, especially as regards standards, plans and audits relating to the security

of pipelines and international power lines. Failure to comply with these regulations constitutes an offence liable to a fine and/or a term of imprisonment. Most of the other amendments proposed to the *National Energy Board Act* add the concepts of safety and security to various existing sections.

PARTS 16 AND 19: INFORMATION-SHARING IN RELATION TO MONEY LAUNDERING AND TERRORIST FINANCING (CLAUSES 97 AND 100-101)

Clauses 97, 100 and 101 of the Bill deal with the sharing of information by and with the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), which processes and analyzes reports from financial institutions and other designated entities on suspicious financial transactions with a view to combating money laundering and terrorist financing. FINTRAC was created by the *Proceeds of Crime (Money Laundering) Act*, adopted in the previous Parliament (S.C. 2000, c. 17), now the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.

The provisions are identical to the corresponding provisions in Bill C-55.

Clause 97 amends the *Office of the Superintendent of Financial Institutions Act* (OSFI Act), thereby enabling the Superintendent of Financial Institutions (the federal regulatory body that oversees banks and other similar financial institutions) to disclose the following to FINTRAC: information relating to the policies and practices used by financial institutions to ensure compliance with their financial transaction record-keeping and reporting obligations under Part 1 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.

The OSFI Act already contains a number of exceptions to the general rule of confidentiality. These are designed to assist other agencies or departments in their supervisory or regulatory functions in relation to financial institutions. The additional confidentiality exception proposed in clause 97 deals with institutional policies and procedures relating to transaction record-keeping and reporting, rather than with information on particular transactions.

Clause 100 amends the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* so as to extend FINTRAC's access to government databases to include national security databases, as well as those relating to law enforcement.

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Clause 101 amends the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* to permit FINTRAC to disclose certain information to or receive it from other bodies or agencies that regulate or supervise persons or entities subject to that Act's financial transaction record-keeping and reporting requirements (i.e., those that deal with large amounts of money, such as banks and other financial sector businesses, law firms, casinos, etc.). **In Committee, officials clarified that information sharing would occur only pursuant to an agreement with the body or agency.** The information received or disclosed by FINTRAC must relate to a person's or an entity's compliance with the transaction record-keeping and reporting requirements under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and may be used only for purposes relating to such compliance.

PART 17: *PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT* (CLAUSE 98)

Clause 98 amends section 7 of the *Personal Information Protection and Electronic Documents Act* (PIPEDA) to permit the *collection* and *use* of personal information by air carriers and other organizations subject to the PIPEDA without the knowledge or consent of the individual, for the purpose of making a *disclosure* for reasons of national security, the defence of Canada or the conduct of international affairs, or a disclosure required by law.

Organizations subject to the PIPEDA are already authorized to *disclose* personal information without the individual's knowledge or consent for reasons of national security, the defence of Canada, the conduct of international affairs, or where otherwise required by law (sections 7(3)(c.1)(i); 7(3)(d)(ii); and 7(3)(i) of the PIPEDA). The proposed amendment clarifies that organizations also have the authority to *collect* and *use* information about individuals without their knowledge or consent for the purpose of making such disclosures.

The department points out that the above amendment is particularly required in order to support the data-sharing regimes under proposed sections 4.81(1)(b), 4.82(4)(b) and 4.82(5)(b) of the *Aeronautics Act* under which Transport Canada officers, RCMP or CSIS designated persons, respectively, may require an air carrier or operator of a reservation system to provide them with passenger information under the air carrier's or operator's control, or that comes into their control within 30 days, for specified persons. It is important that the carrier or operator not have to advise or seek the consent of the concerned individual.

PART 23: *BIOLOGICAL AND TOXIN WEAPONS CONVENTION IMPLEMENTATION ACT*

Clause 106 of Bill C-17 enacts the *Biological and Toxin Weapons Convention Implementation Act*, whose stated purpose is "...to fulfil Canada's obligations under the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*" (the Convention).[10] The proposed Act is divided into four parts: implementation of the Convention, enforcement, information and documents, and regulations. A related amendment to the *Criminal Code* is in clause 108(b.1) of Bill C-17. Part 23 of this Bill is virtually identical to Part 20 of Bill C-55.

Sections 6 and 7 of the proposed Act describe the activities it prohibits. Under section 6, no person shall develop, produce, retain, stockpile, otherwise acquire or possess, use or transfer any biological agent or toxin for any non-peaceful purposes or develop, produce, retain, stockpile, otherwise acquire or possess, use or transfer any weapon, equipment and other means of delivery of agents or toxins for use in armed conflict. Section 6 incorporates the text of Article I of the Convention with some slight modifications. The proposed Act adds the "possession" of biological agents and toxins to the list of prohibited activities, making it more explicit than the Convention. On the other hand, the Convention's reference to the "origin or method of production, of types and in quantities" in relation to the microbial or other biological agents or toxins is not included in the text of the proposed Act; the motivation for this change is unknown. The Act's statement that activities carried out for biological defence are exempt from the prohibition is not included in the Convention.

Section 7 of the proposed Act recognizes that a number of statutes already serve to control the production, possession, use and transfer of biological agents. These Acts include: the *Food and Drugs Act*, the *Health of Animals Act*, the *Plant Protection Act*, the *Feeds Act*, the *Fertilizers Act*, the *Seeds Act*, the *Meat Inspection Act*, the *Fisheries Act*, and the *Pest Control Products Act*. Section 7 allows for a licensing regime either under section 20 of the Act or under any other Act of Parliament. It prohibits the import and export of biological agents, except as authorized under the *Export and Import Permits Act*, which already has a number of biological agents on its Export Control List, thereby requiring a permit for their exportation.

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(10) The full text of the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction* is available at: http://disarmament.un.org/TreatyStatus.nsf/44E6EEAB3C9436B378852568770078D9C0/FFA7842E7FD1D0078525688F0070B382D?OpenDocument. It was signed in 1972.

Enforcement of the proposed Act is covered in sections 8 through 16. Section 8 allows for the establishment of a National Authority if required, either to ensure compliance with the Convention or under international obligations. This National Authority would be responsible for coordination among the various federal departments involved and between levels of government, because the proposed Act would be binding on federal and provincial jurisdictions pursuant to section 5. This section on enforcement was subjected to minor changes since the introduction of Bill C-42 in 2001, and is identical to the corresponding section of Bill C-55. In section 9, the Minister will, in addition to the designation of inspectors, have responsibility for setting the conditions applicable to their activities. Two additional modifications in section 10 are a consequence of the previous change.

Section 11 deals with the powers of entry and inspection granted to inspectors, who may be designated by the Minister. Inspections may be carried out without a warrant, except in the case of a "dwelling-house," where one has a greater expectation of privacy and where a warrant, or the occupants' consent, is required. Section 12 of the proposed Act under Bill C-55 had been substantially modified from that of Bill C-42. Under Bill C-42, the powers relating to seizure, detaining, disposal and forfeiture of biological agents, their means of delivery and any information relevant to the administration of the Act or regulations would have followed the provisions laid out in sections 40 through 49 of the *Health of Animals Act*. Section 12(1) declares that the powers relating to search and seizure must follow the provisions respecting search warrants set out in the *Criminal Code* at section 487. Sections 12(2) and 12(3) relating to the necessity of a warrant and notice of reason for seizure follow section 41(4) and section 42 of the *Health of Animals Act*. Section 14 provides that those found in violation of sections 6 or 7, and 13, 17, 19, or section 18(2) are guilty of an offence and outlines maximum punishments. An additional section had been introduced at 13(2) to guarantee assistance to inspectors in the performance of their duties.

Sections 17, 18 and 19 of the proposed Act pertain to information and documents. They require any person who develops, produces, retains, stockpiles, otherwise acquires or possesses, uses, transfers, exports or imports any microbial or other biological agent, any toxin or any related equipment identified in the regulations to provide any information and documentation that the Minister may request. **Although there is a requirement that documents received by the Minister that have been treated in a confidential manner will**

continue to be so treated, there are significant exceptions. Thus, confidential information may be disclosed to enforce the Act, pursuant to the Convention, or in the interest of public safety. Representatives of the Canadian bar pointed out that those exceptions were of no value in protecting solicitor-client confidentiality. More important, there are no express provisions governing the assertion of confidentiality before the information leaves the custody of a lawyer.

Section 20 lists potential subjects and aspects of the Act on which the Governor in Council may make regulations on the recommendation of the appropriate Minister. Section 20(e) had been modified to reflect the changes in section 12.

Amendments to the *Criminal Code* are dealt with in clause 108(b.1) of the Bill, which adds "production, etc., of biological agents and means of delivery and unauthorized production, etc.," to the list of offences for which, if there are reasonable grounds to believe that such an offence has been or will be committed, authorization to intercept a private communication may be granted to a public or peace officer.

A. The Biological and Toxin Weapons Convention

The Convention prohibits the development, production and stockpiling of bacteriological (biological) and toxin weapons for any purpose other than prophylactic, protective or other peaceful purposes and thus supplements the prohibition on use of biological weapons contained in the 1925 Geneva Protocol. The Convention prohibits not only biological and toxin agents, but the munitions and equipment used to deliver them as well. The Convention was the first multilateral disarmament treaty to ban the use and production of an entire class of weapons. However, it is limited in its effectiveness because it lacks a formal verification regime, without which it is impossible to verify compliance. The Convention entered into force on 26 March 1975. Canada was one of the original signatories to the Convention, signing it on 10 April 1972 and ratifying it on 18 September 1972. To date, 163 parties have signed the Convention; of these, 144 have ratified it.

The text of the Convention is short, comprising 15 Articles and spanning only four pages. This is in contrast to the *Chemical Weapons Convention*, which is more than 140 pages in length and contains detailed instructions on verification procedures. The first four Articles of the Convention describe most of the responsibilities assumed by States Parties. As described above, Article I delineates the activities prohibited by the Convention. Article II calls

for the destruction, or diversion to peaceful purposes, of all biological or toxin weapons. Article III prohibits the encouragement and assistance of any group, state or individuals in their attempts to manufacture or acquire biological agents, toxins, weapons, equipment or means of delivery as specified in Article I. Article IV outlines the requirement for States Parties to implement the Convention.

B. National Implementation of the Convention

When Canada signs an international agreement, ratification may or may not require the implementation of legislation or amendments to existing legislation. Under Article IV of the Convention, each State Party is required to "...take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition, or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere." However, the implementation of the Convention in Canada did not result in any new domestic legislation.[11] In light of recent events, however, the threat of subnational groups or individuals becoming involved with biological weapons in Canada is now perceived great enough to warrant action.[12] Thus, the Convention, which Canada has been bound by internationally for several decades, is now being fully implemented under federal legislation.

C. Biological Weapons Policy and Defence Research in Canada

According to a Department of Defence Policy Directive, "Canada has never had and does not now possess any biological weapons (or toxin based weapons), and will not develop, produce, acquire, stockpile or use such weapons."[13] The Directive goes on to state:

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(11) Marc Miller, *Implementing Canada's Obligations Under the Prospective Protocol to the Biological and Toxin Weapons Convention: Planning for a National Authority*, International Security Research and Outreach Program, Non-Proliferation, Arms Control and Disarmament Division, March 2000, www.dfait-maeci.gc.ca/arms/btwc_national_authority_paper-e.pdf, p. 8.

(12) For further information on the subject of bioterrorism, please refer to the following documents: François Côté and Geneviève Smith, *Bioterrorism*, PRB 01-19E, Parliamentary Research Branch, Library of Parliament, 24 October 2001, lopparl/lopimages2/PRBpubs/bp1000/prb0119-e.htm; Canadian Security Intelligence Service, *Chemical, Biological, Radiological and Nuclear (CBRN) Terrorism*, 18 December 1999, www.csis-scrs.gc.ca/eng/miscdocs/200002_e.html.

(13) NDHQ Policy Directive P3/85 CF Policy – Nuclear, Biological and Chemical (NBC) Defence. The full text of the Directive can be found in Appendix E of *Research, Development and Training in Chemical and Biological Defence within the Department of National Defence and the Canadian Forces*, William H. Barton, National Defence, Ottawa, 31 December 1988, www.vcds.dnd.ca/bcdrc/barton/appe_e.pdf.

> It is recognized that, under present world conditions, the CF [Canadian Forces] may be committed to participate in a war where nuclear, biological or chemical weapons are used. The CF will be prepared to take the appropriate protective measures to defend elements of the CF. As a result, the CF will continue to study and to develop the knowledge necessary to ensure that the defensive measures are adequate.(14)

Thus, Canada is in full compliance with Article I of the Convention, and no action is necessary to fulfil our obligation under Article II, which would require the destruction of any existing stocks of such weapons.

Subsection 6(2) of the proposed Act specifically addresses the issue of research for biological defence. Research on biological and chemical defence undertaken by the Department of National Defence is conducted at several installations, the main one being the Defence Research Establishment Suffield (DRES). The primary focus of its research includes hazard assessment, detection and identification, physical protection, medical countermeasures and verification technology. Canadian research in defence against CB (chemical and biological) agents has produced a vast amount of information on the toxicology and infectivity of CB agents as well as the behaviour of liquids, gases and aerosols when released in the atmosphere. These installations have historically provided Canadian Forces with some of the best defensive equipment in the world. Examples of direct applications of this research include: HI-6, a universal nerve agent antidote; skin decontaminants; and CB agent sampling and detection equipment.

The Biological and Chemical Defence Review Committee (BCDRC) annually reviews the Department of National Defence's research, development and training programs in biological and chemical defence "...to ensure that all activities within those programs are, in fact, defensive in nature and are conducted in a professional manner with no threat to public safety or the environment."(15) In its most recent report, the Committee concluded that there is no evidence of duplicity within the Government's CB defence programs, nor is there evidence that offence-related programs are being conducted.(16)

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(14) *Ibid.*

(15) Heather D. Durham (Chair), Colin R. McArthur and Kenneth L. Roy, *2000 Annual Report of the Biological and Chemical Defence Review Committee*, September 2000, http://www.vcds.dnd.ca/bcdrc/00native/bcdrce00.pdf, p. C-1.

(16) *Ibid.*, p. 2.

Research on biological agents for peaceful purposes other than defence is also conducted in Canada at numerous sites. Among these are veterinary research and clinical laboratories that investigate animal diseases and pathogens, as well as academic, commercial and government labs that perform research on pathogens, toxins, and medical treatments. The inspection, information and documentation requirements of the proposed Act will apply to these bodies.

D. The Protocol to the Convention and Recent Developments

Article XII of the Convention calls for a conference of States Parties at Geneva to review the Convention's operation within five years of its entry into force. The first of these Review Conferences was duly held in 1980, and subsequent conferences were held in 1986, 1991 and 1996. The Fourth Review Conference recommended that conferences of States Parties to review the operation of the Convention should be held at least every five years. Thus, the fifth and most recent conference was held at Geneva from 19 November to 7 December 2001.

At a Special Conference of the States Parties to the Convention held at Geneva in 1994, an Ad Hoc Group was established, the aim of which was to consider appropriate measures, including possible verification measures, and draft proposals to strengthen the Convention.[17] After six years of negotiations, the majority of the text has been agreed to by consensus, yet several aspects of the Protocol remain unresolved. In March 2001, the Chairman of the Ad Hoc Group prepared a composite text which contained compromise suggestions on outstanding issues in an attempt to help "... bridge the remaining gaps..." and facilitate the completion of the draft Protocol.[18] However, in July 2001, the U.S. Special Negotiator for Chemical and Biological Arms Control Issues announced his country's rejection of the draft Protocol and its intent to develop other ideas and approaches to help strengthen the Biological Weapons Convention.[19]

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(17) *Final Report, Special Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, 19-30 September 1994*, www.brad.ac.uk/acad/sbtwc/spconf/spconf1.htm For more detailed information on all aspects of the Review Conferences, the work of the Ad Hoc Group and the Protocol, please refer to the Joint SIPRI-Bradford Chemical and Biological Warfare Project, http://projects.sipri.se/cbw/cbw-sipri-bradford.html.

(18) *Composite Text – Address by the Chairman of the Ad Hoc Group Ambassador Tibor Toth*, 2001, www.brad.ac.uk/acad/sbtwc/other/video/tt_addrs.htm.

(19) *Biological Weapons Convention – Statement by the United States to the Ad Hoc Group of Biological Weapons Convention States Parties*, Geneva, Switzerland, 25 July 2001, www.state.gov/t/ac/rls/rm/2001/5497.htm.

The United States further elaborated on its position regarding the Protocol in November 2001 in the remarks of the Under Secretary for Arms Control and International Security, made to the Fifth Review Conference. Interestingly, a proposal was included that States Parties to the Convention agree to enact national legislation to make it a criminal offence for anyone to engage in activities prohibited by the Convention and to enhance their bilateral extradition agreements with respect to biological weapons offences.[20] This latest Review Conference was adjourned on 7 December 2001, until 11-22 November 2002. Although a draft declaration was nearly complete, serious disagreement over the issue of the Ad Hoc Group remained, and it seemed unlikely that this could be resolved in the remaining time.

The Fifth Review Conference resumed in Geneva on 11 November 2002, and formally concluded on 15 November 2002 with the adoption of a final report setting out an approach to combat the deliberate use of disease as a weapon. Under the terms of this report, the States Parties agreed to meet annually until the next Review Conference in 2006. These annual meetings will be used to discuss and promote common understanding and effective action on a range of issues pertinent to strengthening the Convention. The following five topics were set out for consideration at these meetings:

- **the adoption of necessary, national measures to implement the prohibitions set forth in the Convention, including the enactment of penal legislation;**
- **national mechanisms to establish and maintain the security and oversight of pathogenic microorganisms and toxins;**
- **the enhancing of international capabilities for responding to, investigating and mitigating the effects of cases of alleged use of biological or toxin weapons or suspicious outbreaks of disease;**
- **the strengthening and broadening of national and international institutional efforts and existing mechanisms for the surveillance, detection, diagnosis and combating of infectious diseases affecting humans, animals, and plants; and**
- **the content, promulgation, and adoption of codes of conduct for scientists.**

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(20) *Biological Weapons Convention – Remarks to the 5th Biological Weapons Convention RevCon Meeting*, Geneva, Switzerland, 19 November 2001, www.state.gov/t/us/rm/janjuly/6231.htm.

While some States Parties were deeply disappointed at the inability to successfully undertake initiatives to strengthen the implementation of the Convention through the draft Protocol, most were satisfied with the preservation of multilateralism and the international community's adoption of a new, multi-pronged process to deal with the threat posed by biological weapons.